



# Business League for Massage Therapy & Bodywork (BLMTB)

PO Box 4686 · Butte, MT 59702  
[www.blmtb.org](http://www.blmtb.org) email: [info@blmtb.org](mailto:info@blmtb.org)

December 5, 2005

SJ35 – Study Group 2 Response:

## 2) "address the tensions created by jurisdictional disputes between boards and seek ways to resolve these disputes through consolidation, more specific delineation of authority, or other alternatives."

In our study of the issue, we have found *Reforming Health Care Workforce Regulation: Policy Considerations for the 21<sup>st</sup> Century* (Report of the Taskforce on Health Care Workforce Regulation of the Pew Health Professions Commission, 1995) to be most helpful.

<http://www.futurehealth.ucsf.edu/summaries/reforming.html>

Turf Wars tend to be about scope issues, so the two are inextricably intertwined.

But how is a Scope of Practice developed? There is an assumption in the questions that the scope of practice is developed through either statute or rule. Neither is really the case. As a profession emerges and develops, standards of practice, core competencies, and scope of practice (and maybe even a testing process) are also developing. The legislative process ideally should merely codify them.

According to the Pew Report, the manner in which scopes are codified is at the root of the turf war problem: granting some professions broader scope while limiting others causes those with the broad scope to protect their turf. In addition, these laws are written to define the differences between the professions, thus creating turf wars in an attempt to protect territory and maintain those boundaries. This view is alluded to in the EAIC report *Board ABC's* in the *Overlapping functions/scope of practice/dual licensure* section:

"Discussions ensued regarding ... dual licensure for physical therapists trained as athletic trainers **and how much to limit the scope of practice to avoid conflicts** [our emphasis] with other healthcare practitioners."

We believe that it is erroneous to limit scopes of practice of professions (particularly Complementary / Alternative Medicine – CAM – professions) because another, already licensed, profession "claims" a procedure or process. To do so creates a state-mandated monopoly to the detriment of the consumer. **This type of protectionism does not protect the consumer, but instead restricts access to services, drives up costs, and stifles development of new professions.**

From what we have seen in Montana, emerging professions have little chance of entering the legislative arena and emerging unscathed with an intact scope of practice: the legislative process and legislators tend to side with the more established professions and their needs rather than look very carefully at the competencies of the new profession. The Athletic Trainer's bill is an example of this: legislators appeared to be more interested in protecting the turf of established professions rather than learning about and examining the nationally accepted scope of the ATs.

Although we realize that this view may anger or alienate some and may have a negative effect on our profession's bid to seek licensure, The BLMTB believes that "turf wars" are not a "board

problem" but instead are due to a flawed legislative process that places more emphasis on the political and disregards the fact that more than one profession can provide similar services (based on competencies of the profession) and that combining boards or changing the configuration of boards will not solve the problem.

We believe that combining boards to solve jurisdictional problems will not work, and only exacerbate the problem. Boards will be rendered ineffective due to the resulting infighting, or one profession will run roughshod over another should they have a majority on the board.

### **Suggestions / Ideas**

The Pew Report posed several options, and we found it most helpful. We also have some ideas. In short, there are several possible solutions to the problem:

The first step is for the legislators to acknowledge that no one profession has the "lock" on a particular service area. From the Pew Report:

"a regulatory system that maintains its priority of quality care, while eliminating irrational monopolies and restrictive scopes of practice would not only allow practitioners to offer the health services they are competent to deliver, but would be more flexible, efficient, and effective."

Secondly, it is important for legislators to acknowledge that in the current arena of turf wars, emerging professions sometimes seek legislation in order to, out of necessity, protect their own scope of practice. As we discuss this, we do not imply that everyone in our profession takes this same view. However, in Montana, the BLMTB believes that one reason why it is imperative for massage therapists to seek legal protection is precisely because turf wars exist, and because our scope is being usurped by the various professions already licensed. For example, trained massage therapists learn how to do salt glows, scalp and face massage. These are all regulated by the cosmetology board. Massage therapists also are trained in soft tissue rehabilitative techniques, which include not only massage, but also the use of hot and cold packs, ice, postural evaluations, stretching, Swedish gymnastics, manual therapy, myofascial release, and movement therapy, etc. These are regulated by the boards of medicine and physical therapy. However, in entering the legislative arena to "carve out" our place, we very well could end up NOT being able to perform all of what we have been trained to do. This is problematic in that it discourages formation of professions and drives up consumer costs, while doing nothing to protect the health, safety and welfare of the public. In fact, we believe that the public is actually harmed when access to services is decreased or limited. Each profession delivers a particular service in a unique way: what works for one consumer may not work for another. Limiting access limits the consumer's possibilities for health and healing and is therefore harmful.

We would suggest the following:

1. Adopt a competency-based platform for developing legislation. As mentioned before, legislation brings out professions intent on protecting their turf. Adopting a competency-based platform would require that the parties show why they are or why they are not competent in a particular area based on standards of practice, national tests, etc. If the competency is there, no profession should be able to lobby to prevent a profession from performing that competency.

2. Revising all scopes of practice to be competency based could be phased in over time. In the meantime, this concept could be applied to development of scopes of practice of new professions.
3. Encourage development of new professions by passing a "Freedom of Access" law similar to ones in Minnesota and California. These laws allow consumers to access alternative health care modalities and for providers to exist without fear of prosecution if there is full disclosure present. Providers are to obtain a signed consent form from the consumer that outlines specific items required by the law: training, certifications, years of practice, the nature of the services to be provided, etc. This could solve a lot of problems. If an emerging profession felt protected enough by a statute of this nature, they might not seek regulation, therefore avoiding another turf battle. The members of that emerging profession could then practice without fear of prosecution from an already established profession intent on protecting their turf. The consumer is fully informed and should therefore be protected.
4. Consumer Advocacy Screening / Arbitration Panels. These panels would be set up to hear all sides of the "merits of the case" (or dispute) and make decisions/recommendations based on competency, rather than protectionism of turf. They would be required to take the time to learn about the facts of the issues presented, and take evidence based on that presented by the disputing parties.

To avoid bias and potential conflicts of interest, there should be a separate board for health related issues versus non-health related issues. In health related issues, consumers would NOT be health professionals or members of health boards – there is an inherent bias by health professionals toward other professions and health related issues. A minimum of 5 persons are needed to provide for good discussion and to bring more insight into the panel. In addition, there should be not more than one or two legislators on the panels. A legislator's presence would be helpful to provide insight into that process. It would be helpful to have members who have experienced both allopathic and naturopathic health care for those staffing the health care panel.

These panels could be used in two ways:

- a) To screen legislation prior to the session to pre-arbitrate any differences between the professions, and to hear the "merits of the case" should there be any irreconcilable differences. They can then make recommendations to the legislature, which could adopt or reject those recommendations. It could even be required by statute that any legislation affecting professions must be heard by a screening panel first.
  - b) To hear disputes between boards and make decisions as to how these differences should be handled.
5. Restructuring Licensing all together:
    - a. 2 Bureaus:
      1. Medical
      2. Business/Occupations (that would deal with all non-medically oriented professions)
    - b. The Medical Bureau would have 2 Divisions:
      1. Allopathic: this would include Medicine, physical therapy, occupational therapy, etc.

2. CAM: Complementary and Alternative Health Care (includes the Alternative Health Care Board and other emerging professional boards)  
This division would not be very big yet, but could have the potential to expand.

In having separate divisions for the medical bureau, there would be an understanding that any CAM profession overlapping with an allopathic profession's scope is not only accepted but encouraged by the legislature.

### Additional Questions:

**1) If no board existed (exists) for your profession or occupation, how would you prove it is necessary for public health, welfare, or safety? (e.g. Some components that you might like to address would be: how do licensing, discipline, a board (instead of a program), regulation beyond discipline fit into serving public health, welfare, or safety? What would be your definitions of health, welfare, or safety?)**

- Defining "public health, safety, and welfare issue"

Meeting any **one** of the criteria should suffice.

- The Definition should also include "common good"

In *Board ABC's*, in the "Board Creation" Subsection, you state that "Usually the constituency provides a public rationale for the existence of a board in terms of protecting public health, safety, welfare, or the "common good".

A definition needs to be developed for the term "common good." When licensing/creating a board for the profession, while the threshold of physical "harm" may be small or the other criteria may not be met, it is important to legislate in order to protect the existence of the profession. It is not done for the profession's sake, it is done to protect the consumer by ensuring that the consumer has access to a wide variety of services at a reasonable cost. It is not in the common good to limit or restrict professional scope of practice if another profession already "claims" that portion of the scope. Such limits create state-sanctioned monopolies and drives up consumer costs, while decreasing the availability of services.

- "Health and Welfare" should include protection of access to a profession (with its commonly accepted scope of practice intact). Denial of services harms the public. Consumers should have the right to seek out health care from the provider of their choice, and have available to them the full scope of practice of that practitioner.

As a non-regulated profession that would like to be regulated, the threat to our scope of practice by already regulated professions is very real. Yet, there is a bias to limit or restrict scopes of practice as there is a perception that already licensed professions are harmed if new professions' scopes are allowed to overlap, *even if the national standards of the profession being limited include that competency*. We believe that the public is actually harmed when access to services is decreased or limited to one type of service by limiting a profession's scope. Each profession delivers a particular service in a unique way. The service delivered by one profession may not work for a consumer, but if delivered in a different way, by a different profession, would work. Limiting scopes of practice and limiting access limits the consumer's possibilities for health and healing and is therefore harmful.

There are several ways for the legislature to protect access to a profession with its commonly accepted scope of practice intact, to ensure the survival of marginalized or currently unregulated professions:

1. Pass a Freedom of Access Law similar to Minnesota, California or Rhode Island (modeled after MN)
  2. Create competency-based scopes of practice that allow for overlap of scopes of practice. Boards and Licensure should be geared toward competency: if the professional is trained in that competency, then they should be able to perform that competency.
  3. Adopt a stance that overlapping scopes of practice do indeed exist, and instead of limiting it, embracing it: it will actually benefit the consumer, drive down costs, enhance competition, and improve accessibility to services.
- Protecting the public's health, safety, welfare and common good also includes granting Title licensure to "non-invasive" professions (such as massage therapy). Practice acts should be reserved for the professions that require a high threshold of public safety (for example: the Practice of Medicine).
    - In Title Acts, the title is reserved for those meeting the practice criteria, but the practice is not restricted (as long as the title is not used, a practitioner may perform the practice). Since "harm" is not an issue with the public for these professions, restriction of practice is not necessary.
    - We believe that a title act/ board serves the consumer/public and the profession by:
      1. defining (thus protecting) the scope of practice of the profession which ensures consumer access
      2. defining standards so that consumers can be fully informed
      3. providing a mechanism for discipline for those either misusing the title or exceeding scope, or for other kinds of misconduct that could arise.

All of the following functions of board / licensing are important to the protection of the public.

With Regard to Licensure:

- licensure defines standards of practice, so that consumers can be fully informed as to what constitutes the standard
- licensure creates a mechanism for consumers to find "qualified" practitioners
- licensure provides a mechanism for discipline for those either misusing the title or exceeding scope, or for other kinds of misconduct that could arise.
- licensure defines (thus protects) the scope of practice of the profession which ensures consumer access to that profession

With Regard to a Board:

- There are the usual tasks performed by any board and they apply here as well. Boards are better suited to address these issues than delegating them to a non-professional or departmental employee:
  - Refuse to issue or renew or may suspend, revoke, censure, reprimand, restrict or limit the license of or fine anyone in violation
  - Adopt, amend and enforce rules consistent with the law relative to consumer health, safety and welfare
    - Establish minimum standards of practice and code of conduct via rulemaking
      - Establish and enforce criteria for professional standards and rules of conduct
  - Determine what is and is not unprofessional conduct
  - Establish and enforce criteria for continuing competence
  - Makes recommendations for further training, standards, education.

- A Board provides a place for consumers to complain

While there are nationally accepted guidelines for massage therapists, there are still atypical types and forms of training, such as apprenticeships. A Board made up of professionals and consumers would be able to ensure that qualified persons are not overlooked due to atypical training, nor allow unqualified persons to become licensed because of lack of knowledge on the part of departmental personnel. Our understanding is that this happened with the nursing board recently. A Board would:

- Screen atypical applications
- Define what training is valid.

**2) How do you think fees should be determined? (What are the basic costs? Should there be different levels of boards or programs to meet different costs?)**

The BLMTB has no informed comment on this, although we tend to lean toward a "fee for service" scheme.